

False Advertising and Labeling Suits Two Years After the Landmark Supreme Court Decision in Pom Wonderful Versus Coca Cola: Implications for the Marketing Professoriate

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Introduction

Two years ago the Supreme Court gave a broad ruling in favor of Pom Wonderful (hereafter “Pom”) in its Lanham Act suit claiming Coke’s Minute Maid unit’s labeling was deceptive. Coke labeled a product “POMEGRANATE BLUEBERRY” with “100% JUICE” strategically placed in large font right next to the name. In much smaller print was an explanation that the product was a “flavored blend of five fruit juices.” In actual fact the product contained three drops from an eyedropper of pomegranate juice and even less blueberry juice. As prices fluctuated the formula changed slightly. Its current version is a fairly even mix of apple and white grape juice (The Oyez Project 2014), but at the time of the suit it was 99.4% apple juice because huge amounts of concentrated apple juice were coming to the U.S. so cheaply that China was hit with anti-dumping duties (Bobelian 2014).

Pom Wonderful LLC (hereafter Pom) felt that it created the market for pomegranate juice and argued that Coke’s Minute Maid unit’s “false and misleading labeling” harmed its market position and sales. Pom chose to

challenge Coke under section 43a of the 1946 Lanham Act, a federal statute that protects businesses damaged by false advertising, false product descriptions and false representations about the nature of a product or service. The crux of Coke's argument was that its label met the FDA requirements and therefore it should be exempt from Lanham Act suits.

The oft overturned Ninth Circuit Court of Appeals [that year (the October 13th term) its decisions were unanimously overturned 100% of the time] found for Coke and issued an opinion offering broad exemptions from Lanham Act suits for products covered by more specific federal statutes like the FDCA (the FDA's enabling legislation).

Surprising no one, the Supreme Court decision overturned the 9th circuit and remanded the case for trial on its merits. What was surprising was the broad reach of the ruling. Businesses can now sue under the Lanham Act for false labeling, marketing and advertising even when those labels and statements do not violate FDA, FCC or other agency guidelines. The ruling met with approbation by such high profile journalists as Nina Totenberg and David Savage (Totenberg 2014; Savage 2014) and such veteran court watchers as Scotusblog's John Duffy (Duffy 2014) and Ronald Mann (Mann 2014). These and others thought that more Lanham Act suits would stigmatize bad actors and punish them financially with consumers as the indirect beneficiary.

In the next section we review new cases brought in the wake of the Supreme Court ruling. Then, we examine the consequences of the decision in terms of marketing and legal strategy. Finally, the teaching

consequences of a more robust Lanham Act for the marketing professoriate are assessed.

New Cases

The court's basic decision, if not the wide reach, was foreshadowed in oral arguments. Justice Kennedy said, "This is a label that cheats the public." Alito, Kagan, Sotomayor, Roberts and Ginsburg all made comments or asked questions of the FDA's Melissa Sherry or Coke's Kathleen Sullivan that were skeptical of Coke and the FDA's arguments.

Subsequently, the courts have seen a rash of new cases, beefed up regulatory enforcements and new clarifications from the supreme court and lower courts, some for very familiar household products and businesses like Clorox vs. OxiClean [228 F.3d 24, 33 n.6], Dannon and then General Mills vs. Chobani [No. 16 CV 30, 2016 WL 369364 (N.D.N.Y. Jan. 29, 2016)]; *Gen. Mills, Inc. v. Chobani, LLC*, [No. 16 CV 58, 2016 WL 356039 (N.D.N.Y. Jan. 29, 2016)], and Reed Construction Data Inc. vs McGraw Hill [*Reed Constr. Data Inc. v. McGraw-Hill Cos.*, [49 F. Supp. 3d 385 (S.D.N.Y. 2014), *aff'd* -- F. App'x ---, 2016 WL 80577 (2d Cir. Jan. 7, 2016)]. In the yogurt wars its competitors won an injunction against Chobani. The court decision said Chobani's claims were literally false rather than allowable puffery. Church and Dwight's OxiClean was told to discontinue advertising claims in its "Scary Bleach" commercial that Clorox's chlorine bleach was "scary" or "worrying." Defendant McGraw Hill though, won summary judgment

(affirmed by the 3rd Circuit) based on “lack of materiality.

Another case, followed closely in legal circles, but involving less well known companies, was *Eastman Chem. Co. v. Plastipure, Inc.* [775 F.3d 230 (5th Cir. 2014)].

Eastman felt its Tritan product was unfairly disparaged in Plastipure’s marketing materials. Plastipure argued that its evidence was based on a peer reviewed scientific paper, though Tritan was never mentioned in that paper (Ginsberg, Litman and Kevlin 2015). A jury trial which had found Plastipure and another firm Certichem, Inc. had made false statements of fact about Eastman’s Tritan product was appealed by Plastipure on the grounds that its marketing materials had spoken of scientific opinions rather than actual facts. The 5th Circuit federal court held that companies could not use scientific discourse to make marketing materials with claims that are factually false. The trial court’s decision was upheld.

Ramifications for Marketing Strategy

A broad decision allowing Lanham Act claims even when other, more primary government regulators permit something has the potential to create a tremendous upheaval in many product domains. Brands like Chobani that have built a certain cachet around being supposedly healthier will have to be more careful about the veracity of their marketing claims. Early Lanham Act victories are concentrated around comparative advertising claims, which have always been held under stricter review

standards anyway.

Product domains and industries like health and herbal supplements, organic foods and fitness supplements that have always been rife with fraud might be completely transformed by the Supreme Court's ruling. The California Supreme court ruled against a firm that made demonstrably false claims that its products were "organic" even when lower courts argued for an exemption because Herb Thyme Farms did not violate still nascent federal laws or regulations (*Quesada v Herb Thyme Farms, Inc.*). Several suits against MusclePharm Corporation and its founder Bradley Pyatt might serve notice to an industry where the truth has often taken a back seat to profit. In the health supplement area, one ongoing suit alleges MusclePharm's Arnold Schwarzenegger line of iron Mass weight gain products uses a label that has specific false claims about protein levels and other things (PricePlow 2016). This follows on the heels of a successful Lanham Act suit by a Georgia based competitor that claim competitive damage due to factually false claims about the amount of whey protein in some of its products (*Hi-Tech Pharmaceuticals v MusclePharm Corp.* 2016).

Thus, we may see an era where a completely new class of marketing professionals who analyze competitors' marketing claims looking for clearly deceptive or false statements. You may see new companies who offer strict chain of custody testing of ingredient and benefit claims. Assaying competitors' products could become "de rigueur" in certain product domains.

Teaching Ramifications for the Marketing Professoriate

The feeling among both the journalistic literati and the legal experts was that the Supreme Court's POM v Coke Ruling would benefit consumers (Totenberg 2014; Savage 2014; Duffy 2014; Mann 2014). Supplementing the lax oversight of regulatory agencies with competitive damage litigation would rein in some of the more egregious ethical (if not legal) violations. We could see Lanham Act suits over whether wild blueberries are really wild; fish is really fresh (can it be fresh if it was once frozen); spring water is really from a spring and natural is really natural.

The herbal supplements industry represents a good teaching example. A study by Newmaster et al. (2013) found only 48% of the products tested even contained the product on the label and many of those contain fillers or contaminants, some of which pose serious health concerns. Only two of twelve company's products contained what they said they did. Similar results for commercial seafood and black cohosh and other supplements were cited by O'Connor's (2013) review of research in this area. So, it is easy to see the benefit to consumers from Lanham Act suits that root out just the most egregious fraudsters. Certainly post-menopausal women who took what they thought was black cohosh for hot flashes and perceived no health improvement—perhaps because they bought one of the 25% of brands that contained an unrelated Chinese herbal plant (O'Connor 2013) —would benefit. People deceived into drinking apple juice when they needed acai berry, blueberry or pomgranate for some health benefit would

also benefit. And those people who paid extra for any special product from spring water which isn't spring water to free range eggs from caged chickens to all beef hot dogs containing a substantial amount of pork would certainly benefit.

In teaching the ramifications to students, however, professors should point out the effect that false claims, faked products and other Lanham Act torts have on honest competitors. Elements of the professoriate who use the Socratic Method might begin by asking students, "Who benefits from a broadly applicable Lanham Act?" Students will immediately see that consumers benefit from more honest labels and understand the effect on menopausal women who bought powdered rice and weeds labeled as Black Cohosh or people who bought ground up bitter weed, itself linked to rashes, nausea and flatulence, instead of the Echinacea they thought they were getting (O'Connor 2013). Through the Socratic process students could be drawn to understand the more direct beneficiary would be those two herbal remedy companies out of twelve that actually put what they say they do in their products, the companies which actually get their spring water from a spring, the companies which market wild blueberries that are really *wild* blueberries and companies like Pom Wonderful that make a pomegranate juice product which is actually made with pomegranate juice.

Teaching Implications for Marketing Strategy, Marketing Research, Retailing

Marketing strategy professors might also discuss the strategy implications. It may become routine marketing strategy, for example, to assay competitors' products and assess the honesty of their labels and advertising claims. Marketing research professors may have students design testing and chain of custody procedures for the testing of fake products that would hold up in court. Retailing professors might talk about honestly pricing retailers (assuming these actually exist) challenging competitors' high-low pricing scams (see Bhasin 2014).

Implications for Teaching Marketing Ethics

Marketing professors in a variety of classes might discuss the ethics issues related to POM vs. Coke and ask students. "What does Coke's fight-to-the-death/all-the-way-to-the-supreme-court strategy imply?" Was the ability to put similarly deceptive labels on its myriad of brands across numerous product categories so important that it compensated for the negative publicity associated with the case? After all a Justice of the Supreme Court (Kennedy) of the land would say out loud, "This is a label that cheats the public." Another justice (Kagan) seemed visibly surprised to hear Coke's counsel say that the label was still being used. Marketing ethics courses (or ethics modules within a different course) might also benefit from a discussion or case about how companies might set up internal review procedures and systems to assay their own products and take a closer look at their own labeling and advertising ethics.

Finally, marketing professors might discuss what the ruling says about the federal regulatory agencies. What do students think about the FDA's decision to allow labels like this in the first place or the lax "organic" standards? What does that tell us about the way regulatory agencies and by extension the government itself works? How many of the people involved in a rule making process that made it okay to label a product with three eye drops pomegranate and two of blueberry juice "POMGRANITE BLUEBERRY" with "100 JUICE" right below it went on to executive or consultancy positions in the companies they had recently regulated?

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